IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. AMINADAB ORDUNO, Petitioner.	2 CA-CR 2006-0118-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20000218

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Law Office of Ruben Esparza
By Ruben Esparza
Marana
Attorney for Petitioner

H O W A R D, Presiding Judge.

¶1 After a jury trial, petitioner Aminadab Orduno was found guilty of three counts of kidnapping, three counts of aggravated assault with a deadly weapon, kidnapping a minor under the age of fifteen, and first-degree burglary. The trial court sentenced him to a presumptive prison term of seventeen years for kidnapping a minor under the age of fifteen, followed by concurrent, presumptive prison terms totaling twenty-seven years. We affirmed the convictions and prison terms on appeal. *State v. Orduno*, No. 2 CA-CR 2000-0435

(memorandum decision filed July 17, 2003). Orduno sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., which the trial court denied after an initial hearing and an evidentiary hearing. This petition for review followed.

¶2 On appeal, Orduno claimed, inter alia, the trial court had erred by rejecting a plea agreement on the first day of trial. He also claimed the prosecutor improperly had delegated to the victims the authority to plea bargain. We rejected these arguments because Orduno did not seek review of the trial court's interlocutory order rejecting the plea in a special action but proceeded to trial instead, essentially taking his chances; because the court did not abuse its discretion by rejecting the plea agreement but complied with Rule 28, Pima County Super. Ct. Loc. R. P., 17B A.R.S.; and because the record belied Orduno's contention that the prosecutor had changed for an improper reason an offer of a plea involving a 7.5-year prison term and one for a twenty-year term.

¶3 Orduno filed a notice of post-conviction relief in April 2001. He filed a petition for post-conviction relief in December 2002 and what appears to have been intended as an amended petition in January 2005, in light of the appeal that was pending after the first petition had been filed. Among the claims he raised in the post-conviction proceeding was that *State v. Darelli*, 205 Ariz. 458, 72 P.3d 1277 (App. 2003), which Division One of this court decided on July 22, 2003, five days after we issued our memorandum decision in this case, was a significant change in the law entitling him to relief under Rule 32.1(g). He asserted *Darelli* supported his claim that the trial court had erred when it rejected the plea agreement on the first day of trial. During a hearing in September 2005, in response to defense counsel's argument on this claim, the trial court reviewed this court's decision,

including the portion in which we had stated the trial court had not abused its discretion by rejecting the plea after conducting an individualized consideration of the circumstances of this case. Denying post-conviction relief based on *Darelli*, the trial court stated, "I still find based upon the facts of this case, particularizing this case, the extreme and egregious behavior from your client did not warrant this kind of plea agreement. The Court affirms that at this time."

¶4 On review, Orduno has not established the trial court abused its discretion in denying relief on this claim. In *Darelli*, the court held "that a trial judge may not effectively implement a plea cut-off date, by rejecting all potential pleas except a plea to the charges, based solely on the procedural posture of the case at issue." 205 Ariz. 458, ¶ 1, 72 P.3d at 1278. There, the prosecutor appears to have proposed a possible plea offer the day before trial, and defense counsel avowed to the trial court he had been unable to discuss it with the defendant until the day of trial. *Id*. ¶ 5. The prosecutor discussed the plea with counsel the day of trial and told the court he had just suggested the possible plea but he had not yet obtained authority to actually propose it and he had to check with the victims. *Id*. ¶ 6. Because numerous potential jurors already had been assembled, the trial court stated it would accept no plea other than a plea of guilty to the indictment or dismissal of the charges; otherwise, the court had stated, the case would be tried. *Id*. ¶ 4. Having caused plea negotiations to terminate, the court compelled the defendant to go to trial and he was convicted of all charges. *Id*. ¶ 9. Division One found the court improperly had interfered with plea negotiations. *Id*. ¶ 22.

¶5 First, *Darelli* is not a significant change in the law for purposes of Rule 32.1(g); rather, there, the court simply interpreted existing law in determining the proper role of the trial court during plea negotiations and permissible grounds for rejecting a plea. Second, even assuming arguendo the case could be characterized as a significant change in the law, Orduno was not entitled to relief. We found on appeal, based on the record before us at that time, and the trial court reiterated in this post-conviction proceeding, that it had rejected the plea not only because it was being presented on the first day of trial, but because the court did not find it acceptable under the circumstances of the case. Orduno and his codefendant had terrorized a family, holding a mother, her two small children, and the babysitter at gunpoint, demanding money. They then kidnapped the older child. The outcome of this case would have been no different had this court considered *Darelli* on appeal or, as the trial court made clear, had it existed at the time the trial court rejected the plea.

¶6 On review, Orduno also challenges the trial court's denial of relief on his claims of ineffective assistance of trial counsel after the hearing in September 2005 and an evidentiary hearing in December. A defendant is not entitled to relief based on counsel's ineffectiveness unless the defendant is able to establish counsel's performance was both deficient, based on prevailing professional norms, and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Orduno contends on review he established counsel had been ineffective "at all critical stages of his trial." Specifically, he contends counsel was ineffective by not visiting him and monitoring his behavior, not adequately counseling him

about the importance of maintaining his silence, failing to seek a plea agreement "earlier in the process," and not having Orduno psychologically evaluated for sentencing; by failing to timely present a plea agreement to the court; by failing at sentencing to explore and present evidence in mitigation; and by not "reduc[ing] Mr. Orduno's plea agreement with the state to allow him to be resentenced to between 17-20 years in exchange for his testimony against the co-defendant to writing." In a claim related to the last claim of ineffective assistance of counsel, Orduno contends he was entitled to relief on the grounds that the prosecutor had breached a contract with him after he had satisfied his obligation and that the prosecutor was guilty of misconduct because the state offered a more lenient plea agreement to Orduno's codefendant.

¶7 At the December evidentiary hearing, defense counsel Thomas Martin testified about plea negotiations and contact with Orduno. Orduno briefly testified as well. Criminal defense attorney Natalie Prince testified as an expert, stating she had reviewed the file and found trial counsel's performance had been below the standard of care because he had failed to obtain a psychological evaluation of Orduno, which could have established a mitigating circumstance for sentencing. She also testified counsel had been ineffective by waiting until the day of trial to present the plea agreement. In its minute entry of that date, the trial court denied post-conviction relief "[f]or reasons set forth on the record."

¶8 The claim that counsel had been ineffective for failing to present the plea agreement earlier than the day of trial necessarily fails because, even if deficient, counsel's performance cannot be characterized as prejudicial, in light of the court's finding that it would not have accepted a plea in these circumstances. The court also found, "based upon

the testimony presented, the previous testimony, arguments of counsel, as well as the pleadings, that this defendant did, in fact, receive effective assistance of counsel; that he cannot establish prejudice based on this record." Implicit in the court's latter findings is that nothing counsel might have presented at sentencing, particularly through a psychological evaluation, would have changed the sentences and the court's view that they were appropriate for the crimes committed. Implicit, too, is the finding that counsel's failure to visit Orduno before trial and counsel's other acts or omissions were neither deficient nor, if deficient, prejudicial. These implicit findings are amply supported by the record upon which the court relied, and on review Orduno has failed to establish the trial court abused its discretion in denying relief.

¶9 Orduno also contends on review that the trial court erred by denying relief on his claim that his sentence on the kidnapping convictions was improperly enhanced pursuant to A.R.S. § 13-604.01; application of the statute required that the term be consecutive to any other sentence imposed, § 13-604.01(K), and rendered him ineligible for release from prison before serving the entire term, § 13-604.01(G). Relying primarily on *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004); *State v. Sepahi*, 206 Ariz. 321, 78 P.3d 732 (2003); and *State v. Castaneda*, 209 Ariz. 366, 102 P.3d 985 (App. 2004), Orduno maintains, as he did below, that although the jury was given a form of verdict requiring it to determine whether the victim was under the age of fifteen, the jury was "never asked to consider the primary issue under ARS [§]13-604.01: whether or not Mr. Orduno's conduct actually focused on, was directed against, aimed at, or targeted a victim under the age of fifteen." *See Sepahi*, 206 Ariz. 321, ¶ 12, 78 P.3d at 733 ("'*defendant's conduct*

must be focused on, directed against, aimed at, or target[ed] a victim under the age of fifteen'" before sentence may be enhanced under § 13-604.01), *quoting State v. Williams*, 175 Ariz. 98, 103, 854 P.2d 131, 136 (1993) (emphasis added in *Sepahi*).

¶10 Although the trial court did not specifically address this claim in either of its minute entries, the parties argued the claim during the September 2005 hearing and the court's comments suggest it did not find counsel's arguments persuasive.[1] Orduno has not established the court abused its discretion in denying relief on this claim.

¶11 *Blakely* applies to cases not yet final on June 24, 2004, the date *Blakely* was decided. *See State v. Febles*, 210 Ariz. 589, n.4, 115 P.3d 629, 632 n.4 (App. 2005). We issued our mandate on the appeal in this case on July 21, 2004; therefore, Orduno's case was still pending when *Blakely* was decided. *See id.* ¶ 7. But *Blakely* is not implicated here because the trial court sentenced Orduno to the presumptive prison term. *See State v. Martinez*, 210 Ariz. 578, ¶ 17, 115 P.3d 618, 623 (2005); *State v. Johnson*, 210 Ariz. 438, ¶ 12, 111 P.3d 1038, 1042 (App. 2005). With respect to any claim based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), which Orduno also cites, Orduno waived all but fundamental, prejudicial error because he failed to raise the claim at trial or sentencing. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *Martinez*, 210 Ariz. 578, n.2, 115 P.3d at 620 n.2. The jury specifically found the victim

[1]At that hearing, Rule 32 counsel conceded the jury had made the finding about the child's age but stated repeatedly that the jury had been required to find the offense was "a dangerous crime against children." Counsel also appears to have suggested the jury should have been required to make its finding after being informed of the harsh sentencing results that would follow. This is not exactly the same argument he raises on review, but the arguments on review were, as we stated, raised in Orduno's post-conviction petition.

of the kidnapping was under the age of fifteen, a finding overwhelmingly supported by the evidence that the child was three years old. And kidnapping is among the enumerated offenses that constitute dangerous crimes against children if committed against a child under the age of fifteen. § 13-604.01(M)(1)(i). The evidence showed Orduno and his codefendant consciously and with focus kidnapped this child, albeit with the ultimate goal of forcing the child's parents to pay ransom for his return; in other words, the child was not "'fortuitously injure[d] . . . by [Orduno's] unfocused conduct.'" *Sepahi*, 206 Ariz. 321, ¶ 11, 78 P.3d at 734, *quoting Williams*, 175 Ariz. at 103, 854 P.2d at 136. Therefore, neither *Sepahi* nor *Castaneda* supports Orduno's claim that error occurred here, much less fundamental error.

¶12 Additionally, the court found, first at the end of the September 26 hearing and again after the December 5 hearing, that the parties never had reached a binding "contract" regarding Orduno's cooperation with the state and possible resentencing. This finding is apparently based on and supported by Martin's December 5 testimony and the information that had been provided through counsel during the September hearing. Orduno has not persuaded us on review that the trial court abused its discretion in denying relief on this claim.

¶13 In a related claim, Orduno contends the trial court erred by denying relief on his claim that, "by offering a significantly more lenient plea to the co-defendant, [the prosecutor] created a disparity of treatment between them that violated equal protection." After Orduno was sentenced, his codefendant pled guilty to attempted kidnapping and apparently was placed on probation for fifteen years, as stipulated in the plea agreement. The trial court addressed this claim briefly at the September 2005 hearing in conjunction

with its discussion of the related claim that the victim had been permitted to control the case, which the court essentially found precluded because this court had rejected it on appeal. Although the trial court did not state why it was denying relief on the equal protection claim, that claim, too, is precluded; Orduno could have raised it on appeal. *See* Ariz. R. Crim. P. 32.2.

¶14 But, even assuming the equal protection claim was properly raised in the post-conviction proceeding because Orduno relied on information outside the record on appeal, Orduno has not established the trial court abused its discretion in denying relief on this claim.[2] *See Crerand v. State*, 176 Ariz. 149, 151, 859 P.2d 772, 774 (App. 1993) ("The equal protection clauses of the state and federal constitutions . . . generally require that all persons subject to state legislation shall be treated alike under similar circumstances."); *see also State v. Beckerman*, 168 Ariz. 451, 453, 814 P.2d 1388, 1390 (App. 1991) (state may treat different classes of people in different ways so long as classification is reasonable). When Orduno was found guilty and sentenced, the trial court had no information about the codefendant, whose whereabouts were apparently unknown and whose prosecution was still pending. Orduno would not provide information, purportedly out of fear of the codefendant. Although disparate treatment of defendants may be a mitigating circumstance in capital cases, *State v. Marlow*, 163 Ariz. 65, 71-72, 786 P.2d 395, 401-02 (1989), Orduno and his codefendant do not appear to have been similarly situated for equal

[2]We note that Orduno has not identified the two classes of defendants that were treated differently for purposes of establishing an equal protection claim or argued that there was no rational basis for treating the two classes differently. *See generally State v. Navarro*, 201 Ariz. 292, ¶¶ 25-27, 34 P.3d 971, 977-78 (App. 2001).

protection purposes. *See State v. Gerlaugh*, 144 Ariz. 449, 463-64, 698 P.2d 694, 708-09 (1985) (defendant not entitled to mitigation of first-degree murder sentence because of disparate treatment of himself and codefendants where defendant was more culpable and codefendants were sentenced after he was convicted pursuant to a plea agreement). Moreover, there is no requirement that codefendants be sentenced identically. *State v. Massey*, 2 Ariz. App. 551, 552, 410 P.2d 669, 670 (1966).

¶15 One defendant's more severe sentence may be justified by the defendant's greater relative participation in the offense, the relative maturity of the defendant, and the prior criminal record and background of the defendant. In his petition for post-conviction relief, Orduno conceded that he "was the princip[al] actor in the holding of the family," adding, however, that his codefendant "was the person in ultimate control who physically removed [the three-year-old child] from the home." Finally, the trial court made it clear it would not have accepted Orduno's plea in this case in light of Orduno's conduct; thus, Orduno's request for a comparable plea to the codefendant's was a request for relief that is not available to Orduno.

¶16 The petition for review is granted, but relief is denied.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

GARYE L. VÁSQUEZ, Judge